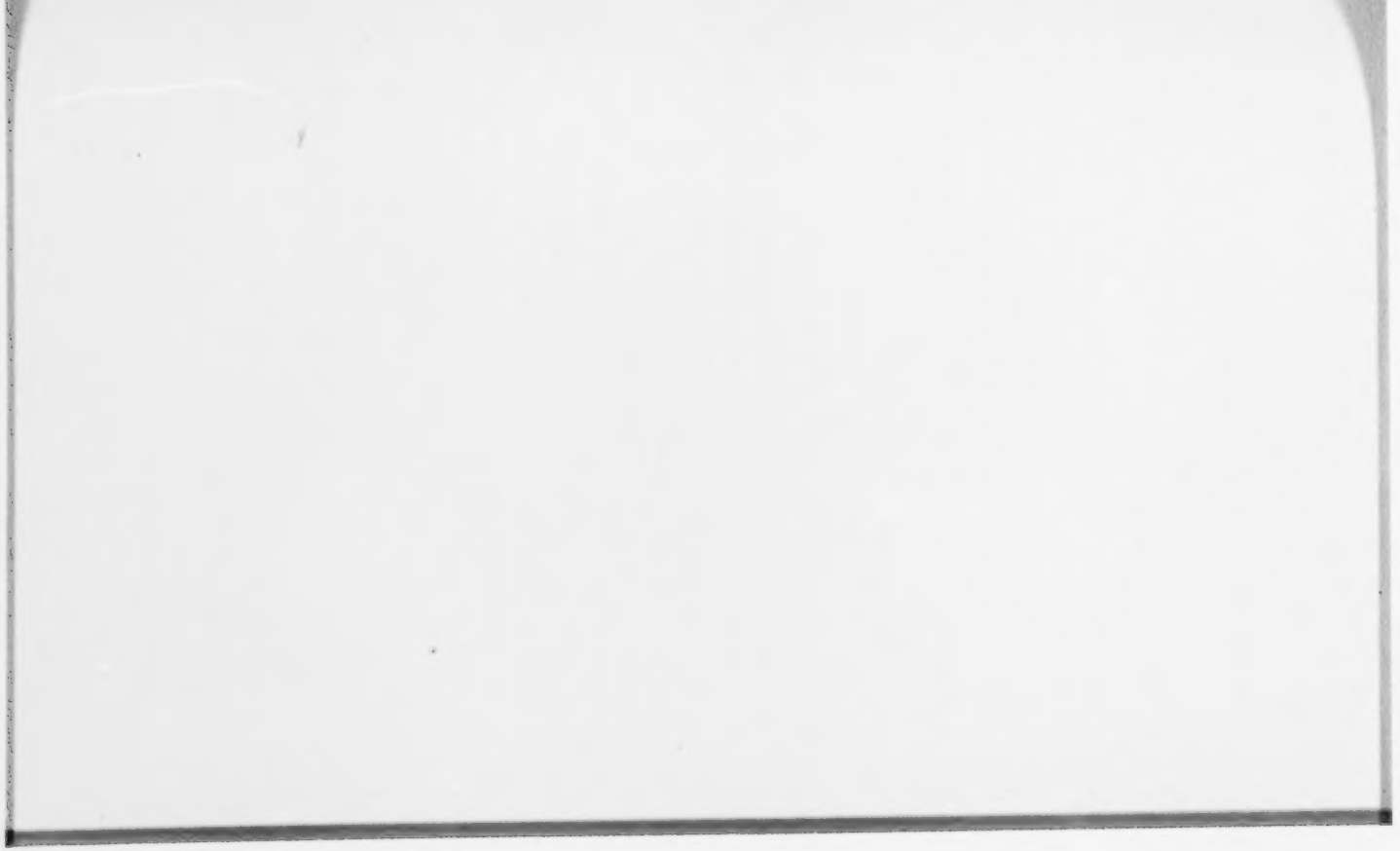

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1063

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Petitioner and Appellant Below,

versus

MRS. EUGENE ADLER,
Respondent and Appellee Below.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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May It Please the Court:

The legal proposition presented by the case at bar appears to have been passed upon by this Honorable Court in at least two cases. We, therefore, respectfully request the indulgence of the Court in order that the attention of Your Honors may be called to the two cases, and that we may show their application to the case at bar.

We have shown in our original brief that the Hart Theatre and the terrazzo sidewalk in front of it were constructed according to *permit of the municipal authorities*,

and the sidewalk was *approved* by the City Engineer of the City of Baton Rouge. (R. 120-121). That the terrazzo sidewalk in front of the Hart Theatre is the same grade and level and conforms to the cement sidewalk on each side of it. (R. 27). That the said terrazzo sidewalk has been used by the public as a sidewalk without change, since its approval by the City Engineer on June 21, 1941. (R. 133).

In *Barnes v. District of Columbia, 91 U. S. 540,* it was held that a municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets, although the fee of the streets is not in the municipal corporation.

This was an action to recover damages for a personal injury received by the plaintiff in consequence of the defective condition of one of the streets of the City of Washington. The accident occurred on K Street east, and arose from the construction of the Baltimore and Potomac Railroad through that street. The road was built by *permission of the municipal corporation* and authority was given to the company to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which plaintiff fell, sustaining serious personal injury.

In the *Barnes* case, *supra,* the defective condition of the street was not created by the municipal corporation but by the Baltimore and Potomac Railroad. Why, then, was the municipal corporation (the District of Columbia)

sued and held liable? For the reason that the excavation was made by *permission* of the municipal corporation, and a municipal corporation is liable for injury to an individual, arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets.

Conceding *arguendo* (which we do not concede) that there is liability to plaintiff in the instant case, then the liability rests upon the municipal corporation—and not upon the defendant—since the terrazzo sidewalk where the injury occurred was constructed by *permission* of the municipal corporation and the same was *approved* by the City Engineer of the City of Baton Rouge. (R. 120, 121).

Mr. Justice Hunt, speaking for the Court in the *Barnes* case, said:

> "The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them."

The Court then cited numerous adjudications in the United States and in England. Would the Court be justified in departing from established legal landmarks to meet the hardships and supposed equities of a particular case?

Mr. Justice Field dissented because he did not think the District of Columbia should be held responsible for the

neglect and omissions of officers whom it has no power to select or control.

Thereafter, by Act of Congress, the situation which caused Mr. Justice Field to dissent in the *Barnes* case was changed, and the District of Columbia was declared a municipal corporation, and vesting its government as such in three commissioners. Act of Congress June 11, 1878, (20 St. U. S., p. 102, c. 180).

ANOTHER CASE.

The case of *District of Columbia v. Woodbury, 136 U. S. 450*, is also authority for the principle for which we are contending.

The defendant in error, Dr. Woodbury, while passing on the sidewalk near the north entrance of the Riggs House on G Street, in the City of Washington, fell into a hole, whereby he sustained personal injuries of a serious character. Claiming that the sidewalk was not in a safe condition for use by the public, and that the District authorities had been grossly negligent in not keeping it in proper repair, he brought this action to recover damages for such injuries.

The first question considered by the Court was whether the District of Columbia is, under any circumstances, liable in damages for personal injuries resulting from the unsafe condition of the avenues, streets, and sidewalks in the City of Washington.

Here, again, we observe that the municipal corporation, and not the abutting property owner or his tenant, was sued and held liable. The *Barnes* case, *supra*, was thoroughly analyzed and affirmed.

In the course of the opinion, Mr. Justice Harlan, as the organ of the Court, said:

> "(3) People must build houses, and, in order to do that, it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water-mains, gas-pipes, and sewers. Nobody has a right to do this without a permit from the authorities, and, if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the District would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted.
>
> "(4) These works are necessarily dangerous to life and limb, and it is the duty of a person doing the work to protect it against accident to travelers on the street; and the duty of a private person is very much the same as that of the district itself, when it is prosecuting an improvement. If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the district authorities to see that it is protected, and they are held responsible that he shall do it; for they were notified that he was going on with the work when he obtained his permit."

For the reasons herein set forth, in addition to the authorities cited in the original brief, we respectfully submit that a writ of certiorari should be granted and the

judgment of the Circuit Court of Appeals should be reversed; and we pray accordingly.

Respectfully submitted,

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